



June 5, 2018

Submitted via FOIA Online

National Freedom of Information Officer
Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2822T)
Washington, DC 20460

Dear FOIA Officer:

This is a request for information on behalf of Sierra Club and Environmental Defense Fund (EDF) pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and the U.S. Environmental Protection Agency’s (“EPA” or the “Agency”) implementing regulations, 40 C.F.R. §§2.100-2.406. Sierra Club and EDF also request a fee waiver for this request under 5 U.S.C. § 552(a)(4)(A)(iii) and 40 C.F.R. § 2.107(l)(2) and expedited processing under 5 U.S.C. § 552(a)(6)(E) and 40 C.F.R. § 2.104(e).

A. Records Requested

EPA has stated that it is in the process of reviewing its Supplemental Finding That It Is Appropriate and Necessary to Regulate Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units, 81 Fed. Reg. 24,419 (April 25, 2016) (the “Supplemental Finding”). Respondent EPA’s Motion to Continue Oral Argument, *Murray Energy Corp. v. U.S. E.P.A.*, Case No. 16-1127 (Doc. No. 1671687) (filed April 18, 2017) at 1.

We request all records relating to the following:

1. Any communications to or from EPA’s Office of Air and Radiation, and/or Office of General Counsel, regarding EPA’s review of the Supplemental Finding, excepting wholly intra-agency communications.

2. Any communications to or from EPA's Office of Air and Radiation, and/or Office of General Counsel, regarding the "Mercury and Power Air Toxics Standards for Power Plants Residual Risk and Technology Review and Cost Review," labeled with Regulatory Identifier Number 2060-AT99, in the Unified Agenda of Regulatory and Deregulatory Actions published by the Office of Information and Regulatory Affairs for Spring 2018, excepting wholly intra-agency communications.¹

This request seeks records generated, modified, sent, or received after April 18, 2017 up to and including the date of the agency's search for records. For these purposes, "wholly intra-agency communications" are those for which every sender and recipient is an employee of EPA.

The term "records," as used above, means information of any kind, including, but not limited to, documents (handwritten, typed, electronic or otherwise produced, reproduced, or stored), letters, e-mails, facsimiles, memoranda, correspondence, notes, databases, drawings, graphs, charts, photographs, minutes of meetings, electronic and magnetic recordings of meetings, and any other compilation of data from which information can be obtained. As used herein, "and" and "or" shall be construed either conjunctively or disjunctively as required by the context to bring within the scope of these requests any information which might be deemed outside their scope by any other construction.

Further, for purposes of this request, the term "records" includes any personal e-mail messages, telephone voice mails or text messages, and internet "chat" or social media messages, to the full extent that any such messages fall within the definition of "agency records" subject to FOIA, 5 U.S.C. § 552, and including any attachments. Per EPA records management policy, electronic messages such as text messages are agency records, which must be preserved and made accessible under the Freedom of Information Act. As such, a satisfactory search for responsive records includes a search for records created by the record custodians using any of the following services: Google Chat, Skype for Business, IBM Sametime, Novell Groupwise Messenger, Facebook Messaging, iMessage; Short Message Service and Multimedia Messaging Service on devices, such as Blackberry, Windows, Apple or Android devices; Google Voice, Twitter Direct Message, Slack, Snapchat, WhatsApp, Pigeon, Yammer, Jive, or, other internal collaboration networks.

B. Claims of Exemption from Disclosure

If EPA regards any documents as exempt from required disclosure under FOIA, please identify each allegedly exempt record in writing, provide a brief description

¹ The agenda may be found here: <https://www.reginfo.gov/public/do/eAgendaMain>.

of that record, and explain the agency's justification for withholding it. This explanation should take the form of a *Vaughn* index, as described in *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), and other related cases. If a document contains both exempt and non-exempt information, please provide those portions of the document that are not exempted from disclosure.

C. Request for Expedited Processing

We request that EPA give this request the benefit of expedited processing. Sierra Club and EDF are primarily engaged in disseminating information and educating the public on policy issues of general interest, and the records will be publicly distributed upon their release. The EPA has informed the U.S. Court of Appeals for the D.C. Circuit that its review is continuing; the requested records are relevant to the outcome of that review, which has been ongoing for over a year. Delay may result in disclosure after EPA's review of the Supplemental Finding is complete; such delay will substantially prejudice the Sierra Club and EDF's ability to utilize the requested information, and harm the public in its ability to understand EPA's review process. That threatened prejudice provides a compelling need for expedition, and demonstrates an urgency to inform the public as to the process by which EPA is conducting its review of the Finding. *See* 40 C.F.R. § 2.104(e); 5 U.S.C. § 552(a)(6)(E)(v). Expedited processing is therefore appropriate.

D. Request for Waiver of Fees

Pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 40 C.F.R. § 2.107(l)(2), Sierra Club and EDF request that EPA waive all fees associated with responding to this request. Sierra Club and EDF seek this information in the public interest and will not benefit commercially from this request. FOIA provides that fees shall be waived "if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l)(2). This request meets both prongs of that standard, as set forth below.

1. The Request Will Contribute Significantly to Public Understanding of the Department's Operations and Activities.

EPA's regulations enumerate four factors by which to determine whether a request will contribute significantly to public understanding, so as to require a waiver of fees under FOIA:

- (1) The subject of the request: Whether the subject of the requested records concerns "the operations or activities of the government";

- (2) The informative value of the information to be disclosed: Whether the disclosure is “likely to contribute ‘significantly’” to public understanding of government operations or activities;
- (3) The contribution to an understanding of the subject by the general public likely to result from disclosure: Whether the disclosure is likely to contribute to public understanding of government operations or activities.
- (4) The significance of the contribution to public understanding: Whether the disclosure is likely to contribute “significantly” to public understanding of government operations or activities.

40 C.F.R. § 2.107(l)(2)(i)-(iv). As set forth below, each of those factors indicates that this request qualifies for a waiver of fees under FOIA.

- (i) *The request concerns identifiable operations or activities of the government.*

This request seeks information related to EPA’s operations and activities—specifically, communications relating to an ongoing Agency review of a prior rule. The request is directed towards specific government action, topic and subject matter—review of the Supplemental Finding—over a defined time period. 40 C.F.R. § 2.107(l)(2)(i) (request must “concern identifiable operations or activities of the Federal government”).

- (ii) *The disclosure is “likely to contribute” to an understanding of government operations and activities.*

The requested records are “meaningfully informative about government operations,” and thus likely to contribute to an understanding of government operations and activities. 40 C.F.R. § 2.107(l)(2)(i). The Supplemental Finding addresses EPA’s authority to promulgate its Mercury and Air Toxics Standards for Coal- and Oil-fired Electric Generating Units (the “Mercury and Air Toxics Standards” or the “Standards”). The Standards are a matter of long-standing, and substantial, public interest. *See, e.g.,* John M. Broder & John C. Rudolf, “EPA Proposes New Emission Standards for Power Plants,” *N.Y. Times* (March 16, 2011) (describing EPA’s proposal of Standards, an “announcement ... 20 years in the making and ... a significant milestone in ... ensuring our children are protected from the damaging effects of toxic air pollution”).² They address pollution that has long been of central importance to the public. *See, e.g.,* Michael Hawthorne,

² Available at <https://www.nytimes.com/2011/03/17/science/earth/17epa.html>.

“Governor Seeks 90% Mercury Reduction,” *Chicago Tribune* (Jan. 5, 2006) (noting public interest regarding “mercury contamination in fish”).³ And the specific proceedings to which the Supplemental Finding responds—the U.S. Supreme Court’s decision in *Michigan v. EPA*, 135 S. Ct. 2699 (2015)—has garnered a great deal of attention. *E.g.*, Adam Liptak & Coral Davenport, “Chief Justice Rejects Effort to Block E.P.A. Limit on Power Plants,” *N.Y. Times* (March 3, 2016).⁴

The Agency has, moreover, indicated that its review of the Supplemental Finding is one of its “top priorities” among its Clean Air Act activities. Amanda Reilly, “EPA ‘Still Thinking About’ Obama Mercury Standards—Wehrum,” *E&E News* (April 19, 2018).⁵ And the specific focal points of EPA’s review—cost-benefit analysis, and its treatment of public health harms—have been identified by both the President and the Administrator of the Agency as central to EPA’s current activities. *See, e.g.*, “Enforcing the Regulatory Reform Agenda,” E.O. 13,777 (Feb. 24, 2017); Dana Nuccitelli, “Pruitt Promised Polluters EPA Will Value Their Profits Over America Lives,” *The Guardian* (April 23, 2018) (noting that Administrator Pruitt announced intent to “disregard ... Bush-era guidance” regarding cost-benefit analysis of environmental rules).⁶

EPA’s review of the Supplemental Finding thus directly implicates elements of the Agency’s operations that are critical to public understanding of its activities and current priorities. The requested records are likely to contribute to public understanding of EPA’s operations and activities.

(iii) *The information will contribute to the understanding of a reasonably broad audience of persons interested in the subject.*

This information will contribute to the understanding of a reasonably broad audience of persons interested in the subject. Sierra Club has both “expertise in the subject area,” as well as the “ability and intention to effectively convey” the requested information to the public. 40 C.F.R. § 2.107(l)(2)(iii). Sierra Club is the nation’s oldest and largest grassroots environmental organization. As such, Sierra Club has long history of providing the public with information as to the role and qualifications of EPA nominees. In addition, Sierra Club has the ability and intention to convey the information sought by this request to interested members of the public. Sierra Club can publicize information received from this request in

³ Available at http://articles.chicagotribune.com/2006-01-05/news/0601050073_1_mercury-emissions-mercury-reduction-release-mercury.

⁴ Available at <https://nyti.ms/1Sldwus>.

⁵ Available at <https://www.eenews.net/stories/1060079569>.

⁶ Available at <https://www.theguardian.com/environment/climate-consensus-97-per-cent/2018/apr/23/pruitt-promised-polluters-epa-will-value-their-profits-over-american-lives>.

monthly electronic newsletters, through social media, and email action alerts, which together reach hundreds of thousands of members, supporters, and subscribers. And Sierra Club reaches a very broad audience. The organization has more than 3 million members and supporters nationwide, who are reached via mail, our website, emails and listservs, and public meetings and events. The Sierra Club website, which hosts a number of blogs as well as online content of the Sierra Magazine, receives more than 26 million unique visits and 30 million page views annually. Sierra Magazine publishes on a range of environmental issues, including climate and energy. For instance, Sierra recently published a story urging oil refineries and other chemical companies to prepare for severe floods related to climate change. Heather Smith, *Planning for the 100-Year Flood Applies to You Too, Chemical Company*, Sierra (Aug. 31, 2017).⁷ In another example, Sierra reported on coal ash dumps and the health hazards of coal ash based in part on information gathered under FOIA. Paul Rauber, *Solving the Climate Puzzle: One Piece at a Time*, Sierra (Nov./Dec. 2009).⁸ In addition, Sierra has been awarded multiple Maggie awards from the western Publications Association, and has been recognized repeatedly for excellence in design by *Folio* magazine's Ozzie Awards.⁹ Sierra Club's communications staff can also disseminate newsworthy information obtained from this request to the media. See, e.g., Rene Marsh & Gregory Wallace, "More than 350 Jobs at EPA Unfulfilled During Trump Hiring Freeze, CNN (April 13, 2017)¹⁰; Lena Sun, "Nearly 700 Vacancies at CDC Because of Trump's Hiring Freeze," Washington Post (May 19, 2017)¹¹; Eric Lipton & Lisa Friedman, "E.P.A. Emails Show an Effort to Shield Pruitt from Public Scrutiny," N.Y. Times (May 7, 2018).¹²

⁷ Available at <http://www.sierraclub.org/sierra/planning-for-100-year-flood-applies-you-too-chemical-company>.

⁸ Available at <http://vault.sierraclub.org/sierra/200911/climate.aspx>.

⁹ With the award-winning Sierra magazine and our extensive use of blogs to communicate with the public, Sierra Club would at a minimum be eligible for a fee waiver as a media requestor. 5 U.S.C. § 552(a)(4)(A)(ii); 40 C.F.R. § 2.107(c)(1)(iii); see also 40 C.F.R. § 2.107(b)(6) (defining "[r]epresentative of the news media"). A representative of the news media is "any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience." 5 U.S.C. § 552(a)(4)(A)(ii); see also *Elec. Privacy Info. Ctr. v. Dep't of Def.*, 241 F. Supp. 2d 5, 6, 11-15 (D.D.C. 2003) (a "non-profit public interest organization" qualifies as a representative of the news media under FOIA where it publishes books and newsletters on issues of current interest to the public).

¹⁰ Available at <http://www.cnn.com/2017/04/13/politics/epa-hiring-freeze/index.html>.

¹¹ Available at https://www.washingtonpost.com/news/to-your-health/wp/2017/05/19/nearly-700-vacancies-at-cdc-because-of-trump-administration-hiring-freeze/?utm_term=.f7b19c738148.

¹² Available at <https://www.nytimes.com/2018/05/07/climate/epa-pruitt-emails-secrecy.html>.

EDF, likewise, has well-established expertise in the subject area, as well as the intention and demonstrated capacity to convey its analysis to the public. EDF has provided consistent updates and analysis related to the Standards. *See, e.g.,* Mercury Alert: Cleaning Up Coal Plants for Healthier Lives (EDF 2011).¹³ EDF has multiple channels for distributing information to the public, including through direct communication with its more than two million members and supporters, press releases, blog posts, active engagement on social media, frequent appearances by staff in major media outlets, and a website for posting documents released under FOIA.¹⁴ EDF has, moreover, collected and disseminated reports and analysis regarding the litigation surrounding the Standards and EPA's actions regarding its Supplemental Finding.¹⁵ EDF has a proven capacity to disseminate records obtained through FOIA to the media.¹⁶

In sum, Sierra Club and EDF have the ability to digest and disseminate information gleaned from FOIA requests to the general public, and will make any newsworthy information or documents received in response to this request publicly available.

(iv) *The information will contribute “significantly” to public understanding of government operations or activities.*

The information Sierra Club and EDF seek will contribute significantly to public understanding of EPA's operations and activities. The Supplemental Finding has been heavily contested, in court and before the Agency. The Agency's communications with outside parties are critically important to understanding EPA's approach to its review, its analysis of the Supplemental Finding, and its decision-making process. Moreover, aside from announcing the fact of its review, EPA has not provided any public hearings or information as to the process by which it is conducting that review; the “level of public understanding prior to the disclosure” sought here is, consequently, near zero. 40 U.S.C. § 2.107(l)(2)(iv). The information sought by the request will illuminate the roles of outside parties in the

¹³ Available at <https://www.edf.org/sites/default/files/EDF-mercury-report-27mar2011-revised.pdf>.

¹⁴ EDF, *Promoting Government Transparency*, <https://www.edf.org/climate/promoting-government-transparency>.

¹⁵ *See, e.g.,* <https://www.edf.org/mercury-and-air-toxics-standards>.

¹⁶ *See, e.g.,* Michael Biesecker, *Emails: Pruitt Monitored Changes to EPA Webpages on Climate*, Associated Press (Feb. 2, 2018), <https://www.apnews.com/85e69300761040a2995f5b457f2ac9f4>; Coral Davenport & Eric Lipton, *Scott Pruitt Is Carrying Out His E.P.A. Agenda in Secret, Critics Say*, N.Y. Times (Aug. 11, 2017), <https://www.nytimes.com/2017/08/11/us/politics/scott-pruitt-epa.html>.

Agency's decision-making process, and the manner in which the Agency is responding to those outside parties. The requested disclosure will, consequently, "be enhanced by the disclosure to a significant extent." 40 U.S.C. § 2.107(l)(2)(iv).

2. The Sierra Club and EDF Have No Commercial Interest in Disclosure.

Sierra Club and EDF are non-profit organizations with no commercial, trade, or profit interests in the requested information. We seek to use this information solely to inform the public and to ensure government accountability, as well as to enhance public understanding of EPA's operations and its fulfillment of its mission to protect public health and the environment. Neither Sierra Club nor EDF have any relevant commercial interest, and the request is entirely in the public interest.

For all of the foregoing reasons, a fee waiver is warranted here under 5 U.S.C. § 552(a)(4)(A)(iii) and 40 CFR § 2.107(l). If EPA does not believe that the above information is sufficient to justify a fee waiver, please contact us for further documentation before deciding upon the waiver request.

E. Conclusion.

Thank you for your assistance in processing this request. Please contact either of us, by e-mail or phone, if you have any questions or concerns about this request for information.

Sincerely,



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